Supreme Court, U.S.
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No. 94-7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WEST PENN POWER COMPANY, ET AL.,

Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT, NORTH BRANCH ENERGY PARTNERS, L.P.

ROBERT F. SHAPIRO
Counsel of Record
LYNN N. HARGIS
DAVID K. SCHUMACHER
Chadbourne & Parke
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000

August 5, 1994

BEST AVAILABLE COPY

RULE 29.1 LIST

Respondent North Branch Energy Partners, L.P. is now known as Washington Power Company, L.P. Washington Power Company, L.P. is a limited partnership. Washington Power (I), Inc. is the general partner and Air Products and Chemicals, Inc. is the limited partner of Washington Power Company, L.P. Washington Power (I), Inc. is a wholly owned subsidiary of Air Products Manufacturing Corporation, which is a wholly owned subsidiary of Air Products and Chemicals, Inc. Washington Power Company, L.P. has no subsidiaries that are not wholly owned.

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STATEMENT OF THE CASE

This short Statement of the Case is intended to supplement the Statement of the Case contained in the Petition for a Writ of Certiorari filed by the Petitioners, West Penn Power Company ("West Penn"), Armco Advanced Materials Company ("Armco") and Allegheny Ludlum Corporation ("Allegheny").

West Penn and Respondent North Branch Energy Partners, L.P. ("North Branch")[1] entered into an Electric Energy Purchase Agreement on October 15, 1987 (the "Burgettstown contract"). Under the Burgettstown contract, North Branch would sell capacity and electric energy to West Penn that would be produced from North Branch's proposed power production facility to be constructed in Washington County, Pennsylvania (the "Burgettstown Project"). The Burgettstown Project would be a "qualifying facility" or "QF" under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C.A. § 824a-3, and the regulations of the Federal Energy Regulatory Commission ("FERC") implementing PURPA.

West Penn and North Branch began negotiations toward execution of the Burgettstown contract in 1985. In June 1986, West Penn and North Branch reached an understanding as to the rate structure that would be included in the Burgettstown contract. The rates agreed to by North Branch and West Penn reflected West Penn's "avoided costs."

On January 8, 1988, West Penn filed a petition with the Pennsylvania Public Utility Commission ("Pennsylvania PUC" or "PUC") seeking approval of the Burgettstown

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[1] In 1993, North Branch Energy Partners, L.P. changed its name to Washington Power Company, L.P. However, to avoid confusion, Respondent will continue to refer to itself herein as North Branch.

contract. On July 8, 1988, the Pennsylvania PUC entered its "Tentative Order and Opinion" granting approval of West Penn's petition and allowing West Penn to recover costs payable under the Burgettstown contract. (Pet. App. H, 47a).[2] However, as a result of a remand order issued by the Pennsylvania Commonwealth Court in *Barasch v. Pennsylvania Public Utility Commission,* 119 Pa. Commw. Ct. 81, 546 A.2d 1296, *modified on denial of reargument,* 119 Pa. Commw. Ct. 115, 550 A.2d 527 (1988), *appeal denied,* 567 A.2d 655 (Pa. 1989) *("Milesburg I")*, the Pennsylvania PUC issued an order entered September 30, 1988 requiring a hearing to consider the Burgettstown contract and other West Penn contracts with other developers of QFs (including the Milesburg Project and the Shannopin Project). (Pet. App. I).

After an exhaustive hearing, an Administrative Law Judge ("ALJ") issued a decision on June 27, 1989. (Pet. App. K). By order dated September 29, 1989, the Pennsylvania PUC adopted the ALJ's recommendation that, for purposes of determining West Penn's avoided costs, a "legally enforceable obligation" arose between West Penn and North Branch for the sale and purchase of power when "serious negotiations" began between the two, which the ALJ found to be in October 1986. The Pennsylvania PUC, however, reversed the ALJ and found that the substantial delay in the regulatory proceedings involving the PUC's approval of the Burgettstown contract, caused primarily by the requirement in *Milesburg I* that a hearing be convened to consider the contract, required that the "milestone" dates in

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[2] Respondent uses "Pet. App." to refer to the Appendix submitted with the Petition for a Writ of Certiorari.

the Burgettstown contract be extended.[3] The Pennsylvania PUC entered an order on October 6, 1989 denying reconsideration of its September 29, 1989 order. (Pet. App. O).

Petitioners sought review of the Pennsylvania PUC's September 29, 1989 order and October 6, 1989 order by the Commonwealth Court. Generally, Petitioners argued that (i) the Pennsylvania PUC erred in extending the milestone dates in the Burgettstown contract, and (ii) the PUC erred in allowing the rates payable under the Burgettstown contract to be based on West Penn's avoided costs calculated at a time before North Branch had made a commitment to deliver capacity to West Penn. (Pet. App. Q, 301a). In *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* No. 2090 C.D. 1989 (Sept. 7, 1990) (unreported) *("Burgettstown I"),* the Commonwealth Court upheld the Pennsylvania PUC's determination that the milestone dates in the Burgettstown contract should be extended. (Pet. App. Q). The Commonwealth Court found, however, that a "legally enforceable obligation" between West Penn and North Branch arose not when "serious negotiations" began between West Penn and North Branch, as the Pennsylvania PUC found, but when West Penn and North Branch executed the Burgettstown contract -- October 15, 1987. Thus, in *Burgettstown I,* the Commonwealth Court agreed with the Petitioners and held

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[3] The "milestone" dates in the Burgettstown contract require North Branch to make progress toward the development of the Burgettstown Project by dates certain or West Penn may terminate the Burgettstown contract. One of the more important milestone dates required North Branch to obtain financing for construction of the Burgettstown Project by October 1, 1989. Failure of North Branch to secure financing by this date, for any reason whatsoever, would have enabled West Penn to terminate the Burgettstown contract.

that for purposes of determining the rates under the Burgettstown contact, West Penn's avoided costs should be determined as of October 15, 1987. The Commonwealth Court remanded the proceedings to the Pennsylvania PUC to recalculate the Burgettstown contract rate consistent with its holding. The Commonwealth Court denied reargument of *Burgettstown I.* (Pet. App. Q, 317a, 319a).

Petitioners sought review of *Burgettstown I* by the Pennsylvania Supreme Court. The Petitioners argued that the Commonwealth Court erred in requiring the rates in the Burgettstown contract to be modified to reflect West Penn's avoided cost at the time the Burgettstown contract was executed and in affirming the authority of the Pennsylvania PUC under PURPA to order a modification of the milestone dates in the Burgettstown contract. On November 19, 1991, the Pennsylvania Supreme Court, without comment, denied review of *Burgettstown I.* (Pet. App. R). On February 3, 1992, the Pennsylvania Supreme Court denied the request for reconsideration filed by West Penn. (Pet. App. S). None of the Petitioners filed a petition for a writ of certiorari with the United States Supreme Court on review of the *Burgettstown I* issues.

On May 7, 1991, as amended February 24, 1992, North Branch filed a petition with the Pennsylvania PUC requesting the PUC to commence proceedings to determine the appropriate rates under the Burgettstown contract in light of the Commonwealth Court's *Burgettstown I* order. On July 6, 1992, the Pennsylvania PUC entered an order requiring North Branch, West Penn and other interested parties to submit calculations as to the appropriate rates payable to North Branch under the Burgettstown contract. (Pet. App. G). In an order entered November 24, 1992, the Pennsylvania PUC ordered that the Burgettstown contract be modified to reflect

the rate calculations submitted by North Branch in response to the PUC's July 6, 1992 order. (Pet. App. F).

The Petitioners sought review of the Pennsylvania PUC's November 24, 1992 order by the Commonwealth Court. Generally, Petitioners challenged the Pennsylvania PUC's determination that the Burgettstown contract was to be modified consistent with the rate calculations submitted by North Branch. Petitioners did *not* seek review of whether the Pennsylvania PUC could extend the milestone dates in the Burgettstown contract or whether it was proper to determine West Penn's avoided costs as of the date West Penn and North Branch executed the Burgettstown contract, the issues now raised to this Court. (*See* Appendix A and Appendix B to this brief.) On July 15, 1993, the Commonwealth Court entered its order in *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* 157 Pa. Commw. Ct. 150, 629 A.2d 221 (1993) *("Burgettstown II"),* rejecting the contentions of the Petitioners. (Pet. App. C).

Petitioners sought Pennsylvania Supreme Court review of *Burgettstown II.* The issues raised by Petitioners before the Pennsylvania Supreme Court were the same issues raised before the Commonwealth Court in *Burgettstown II.* (*See* App. C and App. D). Namely, Petitioners sought review of the Pennsylvania PUC's failure to (i) consider "hindsight information" submitted by Petitioners (as the Commonwealth Court described the disputed information in *Burgettstown II)* when it accepted North Branch's recalculation of the Burgettstown contract rate, (ii) accept West Penn's avoided cost calculation and thus refrain from interfering with internal management of West Penn, (iii) consider issues that were raised for the first time during the remand proceedings following *Burgettstown I,* (iv) provide the Petitioners with due process when the PUC refused to hold a full hearing on

the recalculation of the Burgettstown contract rate, and (v) reject the recalculation of the Burgettstown contract rate because North Branch effectively waived its right to seek such a recalculation when it withdrew a prior request for such a recalculation by the PUC due to the regulatory delay surrounding the approval of the Burgettstown contract. Again, Petitioners failed to raise either of the issues raised to this Court in Petitioners' Petition for a Writ of Certiorari. On April 4, 1994, the Pennsylvania Supreme Court, without comment, denied review of *Burgettstown II.* (Pet. App. A and B).

REASONS FOR DENYING THE WRIT

I. THE COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C.A. § 1257 OVER THE FEDERAL QUESTIONS RAISED BY PETITIONERS

Under 28 U.S.C.A. § 1257, the Court may, by writ of certiorari, obtain jurisdiction over certain proceedings before state courts. In order for the Court to obtain such jurisdiction pursuant to § 1257: (i) the issue raised before the state courts must relate to "any title, right, privilege, or immunity [that] is specially set up or claimed under the ... statutes of ... the United States," and (ii) the state court order from which Court review is sought must be a "[f]inal judgment[ ] or decree[ ] rendered by the highest court of a State in which a decision could be had." Petitioners have failed to meet the jurisdictional requirements of § 1257. Therefore, the Court should deny the writ for want of jurisdiction.

A. The Issues Raised By Petitioners Were Not Raised In The Proceeding Below

The orders of the Pennsylvania courts from which Petitioners seek review are the Pennsylvania Commonwealth Court's *Burgettstown II* order and the order of the Pennsylvania Supreme Court, entered on April 4, 1994, denying Petitioners' discretionary petitions for allowance of appeal of *Burgettstown II* (the "April 4, 1994 order") (*see* Pet. at 4). However, it is clear from the "Statement of Questions Involved" sections in the "Brief for Petitioner, West Penn Power Company" (App. A) and the "Brief of Petitioners Armco Advanced Materials Corporation and Allegheny Ludlum Corporation" (App. B), both filed on March 23, 1993 with the Commonwealth Court, the Commonwealth Court's *Burgettstown II* order (Pet. App. C), and the "Questions Presented for Review" sections of the "Petition for Allowance of Appeal of West Penn Power Company (Burgettstown II)" (App. C) and the "Petition for Allowance of Appeal of Armco Advanced Materials Corporation and Allegheny Ludlum Corporation" (App. D), both filed with the Pennsylvania Supreme Court on August 13, 1993, that the so-called "federal" questions presented by the Petitioners here were not before either the Commonwealth Court when it issued its *Burgettstown II* order or the Pennsylvania Supreme Court when it issued its April 4, 1994 order. Therefore, the Court should deny the writ of certiorari requested by Petitioners, because the issues raised by Petitioners were not adequately presented before the highest state court, in this case the Pennsylvania Supreme Court, as required under § 1257.

In determining whether the Court can review a federal question pursuant to § 1257, the Court must find that the federal question for which review is sought has been "pressed

or passed upon" by the highest state court from which a decision could be rendered. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Illinois v. Gates*, 462 U.S. 213 (1983). When the highest state court does not discuss the federal question in the order from which review by this Court is sought and "'the highest state court has failed to pass upon [the] federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983) (*quoting Fuller v. Oregon*, 417 U.S. 40, 50, n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582 (1969)).

As noted above, it is clear that the federal questions presented here by Petitioners were not "pressed or passed upon" by the Pennsylvania Supreme Court in its April 4, 1994 order or the Commonwealth Court's *Burgettstown II* order. The only issues raised by Petitioners before these courts related to the recalculation of the avoided cost pricing to be used in the Burgettstown contract by the Pennsylvania PUC during remand proceedings ordered by the Commonwealth Court in *Burgettstown I*. The Petitioners themselves acknowledge that the issues presented here were not considered by the Commonwealth Court in its *Burgettstown II* order or by the Pennsylvania Supreme Court in its April 4, 1994 order, but were considered in earlier orders issued by these courts *(Burgettstown I)* which were not appealed to this Court. (Pet. at 16-19). Therefore, the Court should deny the writ of certiorari requested by Petitioner for lack of jurisdiction under § 1257.

B. The Court Should Deny The Writ Requested By Petitioners, As Petitioners Have Forfeited Their Right To Seek Court Review Of The Federal Questions Presented

In addition to the requirement that federal questions must be "pressed or passed upon" by the highest court in a state before the Court can obtain jurisdiction to review the federal questions, § 1257 requires that the order issued by the highest state court for which review is sought be "final." While the federal questions raised by Petitioners were addressed by a "final" order of the Pennsylvania Supreme Court, the final order addressing these issues was not the April 4, 1994 order which is the subject of the Petition for a Writ of Certiorari, but the order issued by the Pennsylvania Supreme Court on February 3, 1992 denying review of the Commonwealth Court's *Burgettstown I* order (the "February 3, 1992 order"). Thus, to obtain a writ of certiorari for review of the federal questions it has raised here, Petitioners should have filed a petition for a writ of certiorari with the Court within ninety (90) days following entry of the Pennsylvania Supreme Court's February 3, 1992 order, pursuant to the Court's Rule 13.1. *See* S. Ct. Rule 13.1, 28 U.S.C.A. Instead, Petitioners sought review of the *Burgettstown I* issues more than two years after these issues were ripe for review by the Court. Because the Petitioners did not seek timely review of the Pennsylvania Supreme Court's February 3, 1992 order under the Court's Rule 13.1, Petitioners have forfeited their right to Court review of the federal questions raised in their Petition for a Writ of Certiorari. Therefore, the Court should deny the petition.

The procedural rules promulgated by the Court, establishing, among other things, time limitations for the filing of petitions for a writ of certiorari, are to maintain "an

orderly appellate process." *See Schacht v. United States,* 398 U.S. 58, 69 (Harlan, J., concurring). These rules, along with the statutory jurisdictional requirements, support an important principle governing court proceedings in the United States -- "that litigation must at some definite point be brought to an end." *FTC v. Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 213 (1952). That is particularly true here, where the Burgettstown contract has already been unreasonably delayed by legal proceedings.

To ensure that the statutory provisions setting forth the Court's jurisdiction and its procedural rules supporting this jurisdiction continue to serve the purpose for which they were originally enacted, the Court should deny Petitioners' request for a writ of certiorari on the grounds that Petitioners failed to seek review of the federal questions presented in a timely manner. Indeed, the Court has dismissed a petition for review when the only issues raised by the petitioner were finally determined in an earlier order by a lower court and the order for which review was being sought resulted from remand proceedings required by the earlier order. *See Hill v. Chicago and Evanston R. Co.,* 140 U.S. 52 (1891); *see also Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507 (1950) (petition for review dismissed when all issues relating to petitioner resolved in prior final court order).

While the Court has held that its Rules establishing time limits for the filing of petitions for a writ of certiorari may be waived, such waiver may only be granted when the "ends of justice so require." *Schacht,* 398 U.S. at 64. The standard for waiver of Rule 13.1 is not met here. Denial of the writ would serve Respondents' interest in obtaining a definite end to the litigation involving the Burgettstown contract. The proceedings involving this contract commenced in 1988. When the Pennsylvania Supreme Court issued its February 3,

1992 order, Respondent continued its development activities with respect to the Burgettstown Project. Respondent relied on the fact that the Pennsylvania Supreme Court had finally spoken on the important issues addressed in *Burgettstown I* -- namely, the Pennsylvania PUC could amend the milestone dates in the Burgettstown contract and West Penn's avoided cost should be determined as of the date the Burgettstown contract was executed -- and Petitioners had failed to seek Court review of the Pennsylvania Supreme Court's February 3, 1992 order. Allowing Petitioners to obtain Court review at this late date of the issues raised would punish Respondents for relying on a final, non-appealable order issued by the Pennsylvania Supreme Court.

Petitioners cannot be heard to argue that the Pennsylvania Supreme Court's February 3, 1992 order was not final. It is clear from the Court's holding in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) that the Pennsylvania Supreme Court's February 3, 1992 order was indeed a "final" order under § 1257, and was thus ripe for review by this Court. In *Cox Broadcasting*, the Court set forth four categories of cases in which the Court will review federal questions addressed in an order issued by the highest court of a state, even though further proceedings in the lower state courts are to follow.[4]

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[4] The four categories of cases set forth in *Cox Broadcasting* are as follows:

(i) Cases in which further proceedings will occur in the state courts but where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479.

(ii) Cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480.

(continued...)

The Pennsylvania Supreme Court's February 3, 1992 order fits squarely within at least the first of the four categories outlined in *Cox Broadcasting*: Cases in which further proceedings will occur in the state courts but where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Indeed, the Burgettstown proceedings are very similar to the proceedings before the Court in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), in which the finality doctrine set forth in *Cox Broadcasting* was applied. In *Barasch*, a case also involving review of an order of the Pennsylvania PUC, the Court found to be final under § 1257 a Pennsylvania Supreme Court order that had remanded proceedings back to the Pennsylvania PUC to determine the petitioners' electric rates consistent with that order. As in *Barasch*, the Commonwealth Court in *Burgettstown I* (as affirmed by the Pennsylvania Supreme Court in the February 3, 1992 order) rejected Petitioners' arguments with respect to the federal questions raised, but remanded the proceedings to the Pennsylvania PUC to

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[4](...continued)

(iii) Cases in which the federal claim has been finally decided by the highest state court, with further state proceedings on the merits to follow, "but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481.

(iv) Cases in which the federal question has been finally decided by the highest state court, with further state proceedings to follow where the party seeking Court review may win on non-federal grounds, "thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of" the state proceeding to follow. 420 U.S. at 482-3.

determine the rates under the Burgettstown contract consistent with its order.

Moreover, the Petitioners have taken the position in a companion proceeding before the Court *(See West Penn Power Co. v. Pennsylvania Public Utility Commission,* No. 93-1341 (filed Feb. 22, 1994) ("*Milesburg,* No. 93-1341")) that an order issued by the Pennsylvania Supreme Court addressing and remanding issues similar to those addressed in *Burgettstown I* is a final order of the Pennsylvania Supreme Court reviewable under § 1257. (Pet. at 27-28). Petitioners cannot have it both ways with respect to the finality of the Pennsylvania Supreme Court's February 3, 1992 order and that court's order for which review in *Milesburg,* No. 93-1341 is sought. Either both orders of the Pennsylvania Supreme Court were final and ripe for review under § 1257, or neither order was final, in which case Petitioners' Petition for a Writ of Certiorari in *Milesburg,* No. 93-1341 was premature and should be dismissed by the Court.

Finally, this case is distinguishable from cases in which the Court addressed federal questions raised in a previously remanded order of a state court. *See, e.g., Hathorn v. Lovorn,* 457 U.S. 255 (1982); *Urie v. Thompson,* 337 U.S. 163 (1949); *Reece v. Georgia,* 350 U.S.85 (1955). In those cases, unlike here, the first order issued by the state court, which addressed a federal question and remanded the proceedings to a lower court, was clearly an interlocutory order of the state court and the petitioner sought review of the federal questions addressed in the first order "at his first opportunity." *Urie,* 337 U.S. at 171. Here, however, the first state court order, the Pennsylvania Supreme Court's February 3, 1992 order affirming *Burgettstown I,* was a final order and the Petitioners did not seek review at their "first

opportunity." Accordingly, their petition should be dismissed.

II. PETITIONERS' GENERALIZED ATTACK ON THE EQUITABLE AND POLICY DECISIONS OF THE PENNSYLVANIA PUC DOES NOT JUSTIFY REVIEW BY THIS COURT

Petitioners, in addition to failing to preserve the purported federal questions presented, have also failed to state a federal question justifying the Court's review. Petitioners' challenge is in essence an attack on the equitable and policy decisions of the Pennsylvania PUC and the Pennsylvania courts. They attack the equitable remedy of the Pennsylvania PUC to preserve the status quo ante for a QF contract, subject to PUC approval by its terms, when unanticipated regulatory and litigation delays substantially delayed such approval. Since neither of the contracting parties could have anticipated this particular delay, the Pennsylvania PUC was simply preserving the bargain that the parties themselves had negotiated.

Briefly, the Commonwealth Court, in *Milesburg I,* reversed a Pennsylvania PUC order approving the pass-through in West Penn's retail rates of rates paid under a QF contract. In *Milesburg I,* the Commonwealth Court held for the first time that utilities must provide individual notices to ratepayers and provide for their full participation in hearings on utility company petitions to the PUC to pass through to the utility's retail ratepayers payments made to QFs. The Commonwealth Court decision was issued one year after the QF contract at issue in that case was executed and presented to the Pennsylvania PUC for approval as required by its terms. This unprecedented decision, and the subsequent individual notices and hearings that it required, not only for

the QF contract before that court in *Milesburg I* but also the Burgettstown contract, substantially delayed Pennsylvania PUC approval of the Burgettstown contract beyond any period that could have been reasonably anticipated by the contracting parties prior to *Milesburg I.* Therefore, in order to preserve the bargain that the parties had negotiated in the Burgettstown contract, the Pennsylvania PUC in its September 29, 1989 order extended certain performance milestone dates to preserve the status quo ante and ensure that the Burgettstown contract did not expire by its terms. (Pet. App. N, 272a-276a).

Equitable actions such as those of the Pennsylvania PUC here are not only clearly authorized by, but are arguably *required* by Section 210 of PURPA, 16 U.S.C.A. § 824a-3, which requires the FERC to promulgate, and the states to implement, rules that *encourage* qualifying facilities. *See* PURPA Section 210(a), (f), 16 U.S.C.A. §§ 824a-3(a), (f). As the Commonwealth Court correctly noted below in *Burgettstown I,* in attacking such authority "West Penn's argument here therefore really amounts to an attack on PURPA itself...." (Pet. App. Q, 314a).

Petitioners attempt to characterize the Pennsylvania PUC's actions to preserve the status quo ante, and the Commonwealth Court's affirmation in *Burgettstown I* of such actions under PURPA, as an assertion by the PUC of the right "to modify that contract *in any manner to ensure that the facility is built.*" (Pet. at 20, emphasis supplied). However, neither the decisions of the Pennsylvania PUC nor those of the Commonwealth Court even suggest that such a sweeping assertion of power by the PUC was being requested or affirmed. If such an assertion of authority to modify a contract "in any manner" should ever be made by a state

utility commission and affirmed by the state courts, it may be worthy of review. However, that is not this case.

Here, the Commonwealth Court upheld the Pennsylvania PUC's exercise of the basic equitable powers of any state commission required to fulfill a mandate to advance federal public policies. In this case, the Pennsylvania PUC acted to fulfill its mandate under PURPA to encourage QFs by ensuring that an unanticipated regulatory delay did not act to frustrate the original bargain made by parties to a QF contract. *See, e.g., West Penn Power Co. v. Pennsylvania Public Utility Commission*, 150 Pa. Commw. Ct. 349, 615 A.2d 951, *reh'g denied*, (Pa. Commw. Ct., Nov. 10. 1992), *appeal denied sub nom., Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission*, 637 A.2d 291 (Pa. 1993) (Pennsylvania PUC has authority to modify QF contract to maintain status quo between parties pending outcome of proceeding on QF contract rates).

The court decisions in this case, therefore, are far from affirming the right of the Pennsylvania PUC to modify a QF contract "*in any manner* to ensure that the facility is built" as the Petitioners contend (Pet. at 20, emphasis supplied). Rather, those decisions are conservative affirmations of very limited actions by the Pennsylvania PUC that were clearly within the PUC's discretion in interpreting FERC's rules in a manner to encourage QFs as required by that statute. *See* PURPA Section 210(a), (f), 16 U.S.C.A. §§ 824a-3(a), (f).

In summary, this case is no more worthy of review by this Court than any other determination of avoided cost by any state utility commission or nonregulated electric utility in the country. All such determinations necessarily involve

policy choices and equitable considerations as to when and how avoided costs should be calculated and applied. Such considerations must take into account the unequal bargaining power of the parties, since the utilities hold most of the necessary information regarding their own avoided costs and essentially all the bargaining power; the potential for the purchasing utility to delay the negotiations and the execution of a contract and create a constantly moving target; the historic reluctance of utilities to purchase from qualifying facilities that was the reason that PURPA was enacted;[5] and other factors that may be present in each individual situation. Petitioners would thus have this Court involve itself in the type of factual detail and policy determinations that constitute the very heart of the state implementation of PURPA, and would have the Court ignore the clear Congressional and FERC intention to give the states substantial discretion, as discussed *infra* at 18-20.

In essence, this Petition for a Writ of Certiorari (along with the petitions in *Milesburg*, No. 93-1341 and *West Penn Power Co. v. Pennsylvania Public Utility Commission*, No. 93-1535 (filed Mar. 29, 1994) ("*Shannopin*")) involves the attempt by a utility and two of its industrial customers to undo a contract that the utility itself negotiated, but from which it has decided in hindsight to distance itself. (This is not surprising, since as noted above, PURPA was enacted because of the utilities' historic reluctance to purchase power from qualifying facilities.) Such a case does not present a federal question that this Court should review.

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[5] *See FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

III. CONGRESS INTENDED TO PROVIDE FLEXIBILITY TO THE STATES IN IMPLEMENTING PURPA ON THE ISSUES RAISED BY PETITIONERS

Petitioners have attempted to find a conflict among the decisions of state courts of last resort regarding implementation of PURPA that they state "warrants plenary review by this Court." (Pet. at 24). Not only is there no such conflict, as discussed *infra* at 22-25, but even if there were, it would reflect nothing more than the variation and experimentation among the states that the Congress and the FERC intended in providing for the implementation of FERC's rules under PURPA by the states.

Congress clearly could have kept the states out of the implementation of PURPA altogether. (Indeed, in *FERC v. Mississippi*, 456 U.S. 742 (1982), a state challenged the authority of the Congress to require states to implement PURPA.) In the absence of the PURPA requirement of state implementation, FERC would have exclusive jurisdiction over the wholesale rates QFs charge utilities and the states would have no role in their determination. *See FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964); *FPC v. Florida Power and Light Co.*, 404 U.S. 453 (1972). Moreover, if FERC determined such wholesale rates, the states would be required by federal preemption principles to pass the rates through to retail ratepayers of the purchasing utilities as reasonably incurred expenses. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). Leaving implementation of the PURPA rules solely in the hands of the FERC would have created uniformity in the implementation of the PURPA rules.

Instead, both Congress in enacting the statute, and the FERC in promulgating its rules thereunder, chose to give broad discretion to the states to implement PURPA. The only requirement of the states under PURPA is to follow the FERC rules. *See* PURPA Section 210(f), 16 U.S.C.A. §824a-3(f). And the FERC rules are intentionally broad, nonspecific rules, intended to give considerable latitude to the states, particularly the rules at issue here. The Court in *FERC v. Mississippi, supra,* noted that the FERC provided in its rules that the states can implement them by issuing rules or resolving case-by-case disputes. 456 U.S. at 751. In this case, the Pennsylvania PUC adopted the latter approach.[6] Petitioners would apparently have this Court review each such case-by-case PUC decision for conformity with all other such state decisions.

The FERC's enforcement policy has also been to give broad latitude to the states in implementing FERC's rules. Its 1983 policy statement on enforcement of its rules against the states noted that the FERC would only consider enforcement if the states failed to carry out their basic implementation responsibilities. *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304 (May 31, 1983). In all the years since the rules were promulgated in 1980, the FERC has received numerous requests for enforcement, but has only issued an enforcement order once. The FERC has therefore given wide latitude to the states to experiment with the

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[6] The Pennsylvania PUC also issued rules for qualifying facilities in general. Petitioners do not challenge these rules, or the PUC order here, as being inconsistent with the PUC rules.

implementation of the PURPA rules in the fashion best suited to their particular circumstances.

IV. PETITIONER'S PLEA FOR POLICY GUIDANCE CONCERNING FERC'S RULES SHOULD BE DIRECTED TO THE FERC

Petitioners also contend that there is an "absence of any other forum for the resolution of this important issue of federal law," in asserting that there is a "clear conflict" among state courts of last resort regarding negotiated QF contracts. (Pet. at 24). As discussed below, there is no such conflict. In any event, there are clearly other (and more appropriate) fora in which Petitioners could raise these policy questions.[7]

The most obvious forum for raising policy concerns is the FERC itself, since it is the FERC's rules, namely 18 C.F.R. §§ 292.301(b) and 292.304(a), that the Petitioners claim are being misapplied. (Pet. at 20-21). As the FERC

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[7] The Petitioners make the bald claim (Pet. at 24, n.13) that: "[F]or all practical purposes, this Court is the only federal court that may take appellate jurisdiction over the important questions of federal law decided by state commissions purporting to act under PURPA," citing to Section 210(g)(1) of PURPA, 16 U.S.C. § 824a-3(g)(1). Petitioners fail to note, however, that Section 210(h)(2)(B) of PURPA, 16 U.S.C. § 824a-3(h)(2)(B), provides that any electric utility may petition the FERC to enforce the requirement that the states implement FERC's rules under PURPA. If the FERC fails to initiate an enforcement action within 60 days, the electric utility may bring an action within the appropriate United States district court to require the state regulatory authority to comply with the FERC's rules. Therefore, if Petitioners believed that the Pennsylvania PUC had failed to implement FERC's rules under PURPA, including the rules relating to the submission of negotiated contracts or the rule for establishing the date of legally enforceable obligations, they were free to seek enforcement from either the FERC or the federal district courts if FERC chose not to initiate an enforcement action.

explained in the preamble to its PURPA rules, the Congress has "provided that the Commission may serve as a forum for review and enforcement of the implementation of this program." 45 Fed. Reg. 12,214 at 12,231 (1980). FERC explained in the preamble that such review and enforcement need not be only of the initial implementation of its rules, but can also consist of review and enforcement of the applications by a state regulatory authority or nonregulated electric utility "on a case-by-case basis...." *Id.*

In the preamble to the PURPA rules, FERC specifically discussed the rule that Petitioner's contend is at issue here, 18 C.F.R. § 292.301(b)(1). (Pet. at 21). FERC recognized that its rules might be interpreted as divesting state authorities of the power to review contracts, but stated that this was not the case *as long as* such review was consistent with the terms, policies and practices under Sections 201 and 210 of PURPA, 16 U.S.C.A. §§ 796 and 824a-3. 45 Fed. Reg. 12,214 at 12,233. FERC concluded it was not "possible or advisable to attempt to establish more precise guidelines than these," so that if there was a question regarding the state's authority, the solution is to "seek an interpretive ruling from the Commission's General Counsel." *Id.*

Petitioners' contention that there is no other forum for the resolution of federal law questions regarding the extent of state commission authority to review and modify QF contracts is thus simply incorrect. The FERC stands ready to offer any needed guidance, the federal district courts are available for enforcement purposes, and, to the extent that Petitioners' complaint is with PURPA itself, as the Commonwealth Court suggests (Pet. App. Q, 314a), the Congress of the United States is the proper forum for Petitioners' contentions.

V. THERE IS NO CONFLICT AMONG STATE COURTS OF LAST RESORT

The cases cited by Petitioners (Pet. at 23) do not support Petitioners' contentions that there is a "clear conflict" concerning the limits of state authority under PURPA among state courts of last resort. (Pet. at 24). All of these cases are distinguishable from the facts in this proceeding.

Petitioners' reliance on *Public Utility Commission v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991), is misplaced. The issues before the Texas court were (1) whether PURPA prohibits "a utility from contracting for and paying a rate in excess of its avoided cost and (2) whether, if a utility may pay more than avoided costs, the regulations impose a limitation on how much of these payments the utility can recover from its ratepayers." 809 S.W.2d at 205. Unlike the present case where the utility purchaser is now seeking to avoid an obligation to purchase power from a QF, Gulf States Utilities was seeking a determination that its contract with a QF, which admittedly contained rates above avoided cost, was valid. The court affirmed its validity. 809 S.W.2d at 207-8.[8] Despite the broad language contained in dicta and cited by Petitioners, it is apparent that the Texas court's determinations were made entirely within the context of a utility seeking to voluntarily contract for rates above its avoided costs.

The next case cited by Petitioners, *In re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990), provides no support for Petitioners' claim that the Pennsylvania PUC and

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[8] The Texas court also held that the Texas commission had full authority to determine, in accordance with its rules, the extent to which any payments above avoided cost might be recovered from ratepayers. 809 S.W.2d at 209-10.

courts misconstrued PURPA. In *Vicon,* the Vermont court expressly declined to rule on claims related to the validity of the power purchase agreement ("PPA") and confined its decision to determining whether the Vermont Public Service Board's decision to *deny* approval of the PPA, which was first submitted three years after the contract was signed, was proper. 153 Vt. at 543, 572 A.2d at 1357. The Vermont court's affirmation of that denial does not support Petitioners' claim that the Pennsylvania PUC lacked jurisdiction to alter the milestone dates or determine avoided costs as of the time of the original contract. (Pet. at 23-24). Rather, the Vermont court recognized that the PPA required initial Board approval in accordance with the procedures set forth in the Board's General Order 45 which required that contracts be submitted to the Board *ninety days prior* to execution and not *three years after* execution. 153 Vt. at 548, 572 A.2d at 1360. The court viewed the three year delay in submitting the contract for approval as a sufficient basis for upholding the Board's action.[9]

The facts in *Water Power Co., Inc. v. PacifiCorp.,* 99 Or. App. 125, 781 P.2d 860 (Ore. App. 1989), *review denied,* 309 Or. 291, 787 P.2d 887, *cert. denied,* 498 U.S. 811 (1990), readily distinguish that case from this proceeding. *Water Power* involved a regulatory scheme under which PacifiCorp purchased QF power at rates specified in a schedule approved by the Oregon Public Utility Commission.

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[9] The court agreed with the Board's concern that unnecessary delays in the approval process invited "'manipulative conduct by the contracting parties.'" 153 Vt. at 548, 572 A.2d at 1360. In contrast, in this case, the delays have been caused by regulatory proceedings and litigation that were completely outside the control of Respondents. Indeed, to allow regulatory proceedings to undo the status quo, as requested by Petitioners, would provide a vehicle for the sort of manipulative conduct that the Vermont court and Board sought to avoid.

One such schedule went into effect in 1982 and a new schedule with lower rates was approved for PPAs executed after September 30, 1983. PacifiCorp, the purchasing utility, refused to execute a PPA with Water Power (a QF) before Water Power had an agreement with third parties who would transmit the power to a point of delivery specified by PacifiCorp. Water Power filed a complaint with the Oregon PUC in October 1983 after which the Oregon PUC directed PacifiCorp to execute a PPA with the older, higher rates[10] provided that Water Power submitted a transmission plan and agreed, as a contractual requirement in the PPA, to obtain a transmission agreement by November 1, 1985. Thus, the facts in *Water Power* suggest that just as the Oregon PUC had the authority to direct PacifiCorp to enter into a PPA using older (and higher) avoided cost rates because of the transmission dispute that delayed contract execution at the time that the older avoided cost rates were in effect, the Pennsylvania PUC had the authority to direct West Penn to adjust the milestone dates and associated rates in the Burgettstown contract due to regulatory delays. Taken in context, the holding of *Water Power* is wholly consistent with the Pennsylvania PUC action below.

Petitioners' reliance on *Bates Fabrics Inc. v. Public Utilities Commission*, 447 A.2d 1211 (Me. 1982) is similarly flawed. Petitioners note in their petition in *Milesburg*, No. 93-1341 at 22, that this case involved a contract that was executed prior to the enactment of PURPA but failed to attach any significance to that distinction. However, as the Maine court noted in *Bates*, "contracts executed prior to the enactment of the PURPA are not affected by the Act." 447

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[10] There is no indication in the decision that PacifiCorp, or anyone else, contested the Oregon PUC's right to direct that older but higher avoided cost rates be used.

A.2d at 1214. Moreover, *Bates*, unlike the instant case, did not concern the scope of state regulatory authority over a PPA between a utility and QF that had been submitted to the regulatory agency for approval. Thus, neither the Maine Public Utilities Commission nor the Maine court expresses an opinion in *Bates* on the scope of the Maine PUC's authority to review a PPA submitted to it for approval.

VI. THE LOWER COURT'S UNANIMOUS FINDING THAT THE DATE OF A "LEGALLY ENFORCEABLE OBLIGATION" WAS THE DATE THE CONTRACT WAS EXECUTED IS A CONSERVATIVE INTERPRETATION OF FERC'S RULES

The Commonwealth Court in *Burgettstown I* also reasonably (although conservatively) interpreted a FERC rule designed to give the states maximum discretion in determining when a "legally enforceable obligation" was incurred, under the discrete circumstances of each case, for purposes of establishing the date at which avoided costs are calculated under FERC's rules. The relevant FERC rule, 18 C.F.R. § 292.304(d)(2), deliberately employed the broader term "legally enforceable obligation," rather than the term "contract," in order to give the state commissions more leeway in fixing the date for determining avoided cost. The FERC explained this choice in the preamble to its rules:

> Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.

45 Fed. Reg. 12,214 at 12,224 (1980).

The decision of the Commonwealth Court in this case that the "legally enforceable obligation" was in fact the date of execution of the contract was therefore a conservative interpretation of FERC's rules. Indeed, half of the Pennsylvania Supreme Court, in a concurring opinion accompanying the order for which the Court's review is sought in *Milesburg,* No. 93-1341, would have chosen an earlier date which would have produced higher avoided costs and thus higher payments to Burgettstown. See *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* 634 A.2d 207, 211-13 (Pa. 1993) *("Milesburg II")* (Papadakos, J., concurring and dissenting).

Petitioners nonetheless contend that the date of a "legally enforceable obligation" is that date on which the Pennsylvania PUC approves the contract.[11] This interpretation is inconsistent with both FERC's rules and the policy behind them, as discussed above. In addition, such an interpretation would create a perpetual moving target -- any delay in PUC approval would change the date for calculating avoided costs to the date of the delay. The changed avoided costs would then have to be calculated and approved, and any delay in approving them would again change the date of the avoided costs.

Contrary to the impression fostered by the Petitioners' brief, the purpose of PURPA was *not* to provide the lowest possible rates for the utility's customers. PURPA was enacted in the aftermath of the oil price crisis of the early 1970s in order to reduce the nation's dependence on foreign oil. It provided two methods to achieve this result:

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[11] This contention was neither raised before the Commonwealth Court in *Burgettstown II* nor raised before the Pennsylvania Supreme Court on review of *Burgettstown II.* (*See* App. A, App. B, App. C and App. D).

conservation programs and the encouragement of energy efficiency. The latter goal was to be achieved by requiring utilities, that had been reluctant to do so in the past, to purchase electric energy from certain generating facilities that used renewable resources for fuel or that used fossil fuel efficiently by sequentially producing electric energy and useful thermal energy (for heating, cooling or manufacturing purposes) from the same energy source. *See FERC v. Mississippi,* 456 U.S. at 750.

Under PURPA, ratepayers would not be harmed because these QFs would receive the prices that the utilities would otherwise have paid for comparable energy and power (their "avoided cost"). In fact, the Court upheld the FERC's rules requiring that utilities pay qualifying facilities their *full* avoided costs, rather than some percentage thereof, because the FERC found this necessary to encourage QFs. *American Paper Institute v. American Electric Power Service Corp.,* 461 U.S. 402, 415-16 (1983).

The FERC recognized from the outset that avoided costs could fall (just as they could rise) after contracts had been signed based on avoided costs estimated for the life of the contract. However, the FERC also recognized the necessity of such long-term contracts in order to finance generating plants. FERC's rules therefore addressed the possibility that prices might change after avoided costs had been estimated and stated that its rules:

> are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs. Some of the

> comments received regarding this section stated that, if the avoided cost of energy at the time it is supplied is less than the price provided in the contract or obligation, the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers. The Commission recognizes this possibility, but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase. The Commission does not believe that the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.
>
> ...The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility....

45 Fed. Reg. 12,214 at 12,224 (1980).

Petitioners here are attempting to do exactly what the FERC anticipated they might do, *viz.*, to attempt to deprive North Branch of the benefits of its commitment because of changing circumstances. However, as the PUC and the Pennsylvania Supreme Court concluded in considering a

similar challenge to a QF contract, "no matter what point in time is used to fix rates, ratepayers will bear the risk that rates will go down and QFs will bear the risk that they will go up." *Milesburg II,* 634 A.2d at 212. Indeed, even as the Court reads this brief, energy prices are probably rising or falling.

In summary, by arguing that contractual avoided costs may never be above actual avoided costs as measured at any point in time, Petitioners are in essence attacking the FERC's rules that provide that QFs may be paid avoided costs as estimated at the date of a "legally enforceable obligation." The Court has already reviewed and affirmed FERC's rules. *American Paper Institute v. American Electric Power Service Corp., supra.*

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT F. SHAPIRO
Counsel of Record
LYNN N. HARGIS
DAVID K. SCHUMACHER
Chadbourne & Parke
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000

August 5, 1994

APPENDIX TO
BRIEF IN OPPOSITION OF RESPONDENT
NORTH BRANCH ENERGY PARTNERS, L.P.

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ARMCO ADVANCED MATERIALS CORPORATION, et al.,	)	
Petitioners,	)	No. 2742
v.	)	C.D. 1992
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	)	
Respondent.	)	
WEST PENN POWER COMPANY,	)	
Petitioner,	)	
v.	)	No. 2755
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	)	C.D. 1992
Respondent.	)	
NORTH BRANCH ENERGY PARTNERS, L.P.,	)	
Petitioner,	)	No. 58
v.	)	C.D. 1993
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	)	
Respondent.	)	

BRIEF FOR PETITIONER, WEST PENN POWER COMPANY

Petition for Review of Opinion and Order of Pennsylvania Public Utility Commission entered on November 24, 1992, at Docket No. P-880284 on Remand from the Commonwealth Court Order of September 7, 1990 (Burgettstown II)

IV. STATEMENT OF THE QUESTIONS INVOLVED

a. Whether the Pennsylvania Public Utility Commission erred as a matter of law in failing to follow the Order of Commonwealth Court on remand to update the capacity cost credit in an Electric Energy Purchase Agreement by making a new calculation using inputs in existence at the time the EEPA was signed, October 15, 1987, rather than as of the earlier time of serious negotiations between the contracting parties, in that the PUC approved a capacity cost credit recalculation which did not take into account inputs appropriate for October 15, 1987.

(ANSWERED IN THE NEGATIVE BY THE PUC.)

b. Whether the Pennsylvania Public Utility Commission erred as a matter of law for failing to follow the Order of the Commonwealth Court on remand, as the PUC refused to recognize West Penn's proper exercise of management discretion in determining that a coal fired generation station was not an appropriate input in the recalculations of the capacity cost rates for the October 15, 1987 contract signing date.

(ANSWERED IN THE NEGATIVE BY THE PUC.)

c. Whether the Pennsylvania Public Utility Commission erred as a matter of law in taking judicial notice of West Penn's entire PURPA 210 filings for 1986-1992 as a basis for rejecting West Penn's recalculations, as no party requested that judicial notice of the filings be taken and the PUC took judicial notice of the filings without giving West Penn an opportunity to demonstrate

that the PUC misconstrued the information contained in those filings.

(NOT ANSWERED BY THE PUC.)

d. Whether the Pennsylvania Public Utility Commission erred as a matter of law in refusing to consider four of West Penn's attachments to its recalculations for the reason that the attachments were not part of the initial proceedings and were not public record, because in doing so the PUC, in effect, limited its consideration of evidence to that which addressed inputs appropriate for the time frame of serious negotiations, not for the October 15, 1987 contract signing date.

(ANSWERED IN THE NEGATIVE BY THE PUC.)

e. Whether the Pennsylvania Public Utility Commission erred as a matter of law since it accepted varying capacity rates from 4.9189 cents/kwh to 5.7106 cents/kwh, with concomitant project on-line dates ranging from July 1, 1994 through October 1, 1995, or thereafter, as appropriate recalculation of capacity costs to be paid to North Branch, when North Branch previously waived any claim it had to capacity rates above 3.6 cents/kwh.

(ANSWERED IN THE NEGATIVE BY THE PUC.)

f. Whether the PUC erred as a matter of law by not holding hearings to ascertain the proper calculations of the avoided capacity costs as of October 15, 1987.

(ANSWERED IN THE NEGATIVE BY THE PUC.)

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ARMCO ADVANCED MATERIALS CORPORATION AND ALLEGHENY LUDLUM CORPORATION,	)	No. 2742 C.D. 1992
Petitioners,	)	
v.	)	
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	)	
Respondent.	)	
WEST PENN POWER COMPANY,	)	
Petitioner,	)	
v.	)	No. 2755 C.D. 1992
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	)	
Respondent.	)	

BRIEF FOR PETITIONERS ARMCO ADVANCED MATERIALS CORPORATION AND ALLEGHENY LUDLUM CORPORATION

Petition for Review of Opinion and Order of Pennsylvania Public Utility Commission entered on November 24, 1992, at Docket No. P-880284 on Remand from the Commonwealth Court Order of September 7, 1990 (Burgettstown II)

III. STATEMENT OF THE QUESTIONS INVOLVED

Where a public utility and the developer of a proposed qualifying facility ("QF") power plant voluntarily negotiate a contract with the purchase price based on the utility's avoided cost as of the time of *"serious negotiations"* in accordance with the then existing policy of the Pennsylvania Public Utility Commission ("Commission"); and where the Commission's policy is reversed by an order of this Court which found that avoided cost must be calculated at the time a QF incurs a *"legally enforceable obligation"* to deliver capacity; in the remand proceeding before the Commission where the utility's avoided cost is to be recalculated as of the proper time:

(1) MAY THE COMMISSION TAKE OVER THE UTILITY MANAGEMENT FUNCTION OF PLANNING GENERATING CAPACITY RESOURCE ADDITIONS FOR ITS SYSTEM IF THERE HAS BEEN NO ABUSE OF MANAGERIAL DISCRETION BY THE UTILITY AND THE PUBLIC INTEREST HAS NOT BEEN ADVERSELY AFFECTED?

Suggested Answer: No

(2) WHERE THE QF DEVELOPER HAD WITHDRAWN ITS REQUEST FOR A PURCHASE PRICE HIGHER THAN THE RATE CONTAINED IN THE ORIGINAL CONTRACT IN ORDER TO OBTAIN A FAVORABLE RULING FROM THE COMMISSION, MAY THE PUC GRANT

A HIGHER RATE IN THE REMAND PROCEEDING?

Suggested Answer: No

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WEST PENN POWER COMPANY, Petitioner,	:	
v.	:	No. 0577
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	W.D. Allocatur Docket 1993
Respondent,	:	

PETITION FOR ALLOWANCE OF APPEAL OF WEST PENN POWER COMPANY (BURGETTSTOWN II)

Petition for Allowance of Appeal
from the Order of the Commonwealth Court
of Pennsylvania entered July 15, 1993,
at Nos. 2742 and 2755 C.D. 1992,
affirming the Order of the
Pennsylvania Public Utility Commission
entered November 24, 1992
at Docket No. P-880284 (Burgettstown II)

III. QUESTIONS PRESENTED FOR REVIEW

DID THE COMMISSION, BASED ON IMPROPER DATA AND AN IMPROPER AND ILLEGAL STANDARD AND IN VIOLATION OF PURPA, IMPROPERLY APPROVE PURPA DEVELOPER CALCULATIONS OF AVOIDED CAPACITY COSTS IN THE AMOUNT OF OVER $30 MILLION PER YEAR FOR THIRTY-THREE (33) YEARS, WHICH AVOIDED CAPACITY COSTS ARE TO BE PAID BY WEST PENN'S CUSTOMERS THROUGH WEST PENN TO THE PURPA DEVELOPER?

DID THE COMMISSION IMPROPERLY REFUSE TO CONSIDER WEST PENN'S CALCULATIONS OF THE APPROPRIATE AVOIDED CAPACITY COSTS UNDER THE APPROPRIATE TIME FRAME BECAUSE THESE CALCULATIONS WERE NOT PART OF THE INITIAL PROCEEDINGS, THEREBY IMPROPERLY LIMITING ITS CONSIDERATION OF EVIDENCE TO A TIME PERIOD PREVIOUSLY DECLARED UNLAWFUL UNDER PURPA BY THE COMMONWEALTH COURT?

DID THE COMMONWEALTH COURT ERRONEOUSLY RELY UPON SHANNOPIN II TO PRECLUDE CONSIDERATION OF DATA DEMONSTRATING THAT THE PURPA DEVELOPER'S CAPACITY WAS EXCESS AND UNNEEDED AS OF THE PERTINENT OCTOBER 15, 1987 DATE, AND THAT WEST PENN'S CUSTOMERS SHOULD NOT BE REQUIRED TO PAY FOR SUCH CAPACITY?

DID THE COMMONWEALTH COURT IGNORE THE FAILURE OF THE COMMISSION TO PROVIDE WEST PENN WITH ADEQUATE DUE PROCESS RIGHTS

AND THE REFUSAL OF THE COMMISSION TO FOLLOW THE COURT'S ORDER DESPITE THE FACT THAT THE ISSUES WERE PROPERLY RAISED AND BRIEFED BY WEST PENN?

DID THE COMMONWEALTH COURT ERR BY RELEASING THE PURPA DEVELOPER FROM ITS WAIVER OF AN INCREASE IN AVOIDED CAPACITY COSTS, WHEN THE WAIVER WAS MADE, OVER OBJECTION, IN THE CONTESTED PUC PROCEEDINGS AND AS AN INDUCEMENT TO THE COMMISSION'S APPROVAL OF THE PURPA DEVELOPER'S REQUESTED CONTRACT MODIFICATIONS?

DID THE COMMISSION ERR BY FAILING TO HOLD HEARINGS TO ASCERTAIN THE PROPER CALCULATIONS FOR AVOIDED COSTS AS OF OCTOBER 15, 1987?

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ARMCO ADVANCED MATERIALS CORPORATION AND ALLEGHENY LUDLUM CORPORATION, Petitioners,	)	
v.	)	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent.	)	No. 0457 W.D. Allocatur Docket 1993
WEST PENN POWER COMPANY, Petitioner,	)	
v.	)	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent.	)	

Petition for Allowance of Appeal from the Orders of the Commonwealth Court of Pennsylvania issued July 15, 1993 and July 22, 1993 at Nos. 2742 and 2755 C.D. 1992 affirming the Order of Pennsylvania Public Utility Commission entered on November 24, 1992, at Docket No. P-880284

III. QUESTIONS PRESENTED FOR REVIEW

Where a public utility and the developer of a proposed qualifying facility ("QF") power plant voluntarily negotiate a contract with the purchase price based on the utility's avoided cost as of the time of *"serious negotiations"* in accordance with the then existing policy of the Pennsylvania Public Utility Commission ("Commission"); and where the Commission's policy is reversed by an order of the Commonwealth Court which found that avoided cost must be calculated at the time a QF incurs a *"legally enforceable obligation"* to deliver capacity; in the remand proceeding before the Commission where the utility's avoided cost is to be recalculated as of the proper time:

(1) MAY THE COMMISSION TAKE OVER THE UTILITY MANAGEMENT FUNCTION OF PLANNING GENERATING CAPACITY RESOURCE ADDITIONS FOR ITS SYSTEM IF THERE HAS BEEN NO ABUSE OF MANAGERIAL DISCRETION BY THE UTILITY AND THE PUBLIC INTEREST HAS NOT BEEN ADVERSELY AFFECTED?

Suggested Answer: No

(2) MAY THE COMMISSION TAKE OVER THE UTILITY MANAGEMENT FUNCTION OF PLANNING GENERATING CAPACITY RESOURCE ADDITIONS FOR ITS SYSTEM IF THE UTILITY DID NOT IMPROPERLY RELY ON HINDSIGHT INFORMATION IN ITS AVOIDED COST RECALCULATION?

Suggested Answer: No